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Jan. 14. 1761.

A N S W E R S

F O R

Agnes Stewart of Physgill, and John Hathorn of Over Aires, her Husband, Pursuers;

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The PETITION of *Alexander Earl of Galloway*, and the other Trustees for the Creditors of the deceased Captain *John Stewart of Physgill*, Defendants.

THE Interlocutor complained of by this Petition, will appear to be well founded, by a Recital of the Facts and Procedure which gave Rise to this Question; and a very short Argument will be sufficient in answer to the Petition.

By Marriage-Contract, of this Date, between *John Stewart of Physgill*, and *Agnes Stewart*, Daughter and Heiress of *Thomas Stewart* Provost of *Wigton*, the said *Agnes* disposed her Lands and Estate of *Glenturk, &c.* to the said *John Stewart*, and the Heirs of the Marriage; which failing, to the Heirs-male of *John Stewart's* Body of any after Marriage; which failing, to herself, and her own Heirs whatsoever: And the said *John Stewart*, on the other Part, was bound and obliged to provide and secure whatever Lands, Heretage, &c. he should happen to conquest and acquire during the Marriage, to the Heirs thereof. Upon the Precept
A of 1663.

of Seafin contained in the said *Agnes Stewart's* Disposition, *John Stewart*, the Husband, was infest in her proper Lands, and his Infestment was duely recorded in the general Register of Seafins.

Of this Marriage there were Issue four Sons and four Daughters. *David*, the eldest Son, predeceased his Father without Issue, but *Robert*, the second Son, also predeceasing his Father, left Issue the Pursuer, then an Infant, who became undoubted Heir of the afore-said Marriage, and, in that Character, was entitled to the Succession of both Estates, upon the Death of her Grandfather, *John Stewart*, by the Marriage Settlement above-mentioned.

It appears, that, after the Death of *Robert* the second Son, a Scheme was early conceived to frustrate his Infant Child of this Succession: There had been two Duplicates of the afore-said Marriage-Contract duely subscribed by the Parties themselves, and many of the mutual Friends; but it happened, that the Duplicate which had been delivered to the Bride's Friends was defective in Form, the Names and Designations of the Witnesses being left blank; and Advantage was taken of this Circumstance, to pave the Way for a Settlement, which was obtained from old *John Stewart*, to the Exclusion of his Infant Grandchild, the Daughter of *Robert*.

1716. *Robert's* Widow was an *English* Lady; and suspecting that, after her Husband's Death, there was such a Design in Agitation, she brought a Process, of this Date, before the Court, in name of her Infant Daughter, for Exhibition and Delivery of that Duplicate of the Marriage-Contract which had been delivered to the Husband *John Stewart*, and was duely executed.

To this Process *John Stewart* himself, *William Stewart* his third Son, then become the eldest, by the Death of his two elder Brothers, and *John Coltrain* of *Drummorel*, Grandson



Grandson to the said *John Stewart*, by *Elisabeth* his second Daughter, were made Parties, as the Persons in one or other of whose Hands the aforefaid Marriage Articles were supposed to be: And as fundry Proceedings were had in the said Procefs, to force Exhibition and Delivery of the Marriage-Contract, *John Coltrain* of *Drummorel*, who was a Party to the said Procefs, and so much interested in the Settlements of this Estate, cannot be supposed ignorant of the Infant's Claim, as founded upon that Marriage Contract.

During the Dependence of this Procefs, *Robert's* Widow having gone to *London*, and carried her Infant Daughter with her, to visit her Relations there, she was taken ill and died, so that the Procefs was at an End, and the Child's Concerns were left at the Mercy of her Father's, Friends, whose Interest it was to conceal her Right, and to disappoint her Succession.

Of this Date *John Stewart*, who, by this Time, as your Lordships will perceive, must have been a very old Man, and was very much decayed, was prevailed upon to execute a Settlement of both his own and his Wife's Estate, in the Form of a strict Entail, by which he limited the same to the Heirs-male of his own Body, Remainder to the Heirs-female of his Body, and the Heirs-male of their Bodies, the eldest Heir-female succeeding without Division, &c. but with an express Exheredation of his Infant Grandchild, the Daughter of *Robert*, in the following Words: "Secluding and debarring always the Daughter of the deceased *Robert Stewart*, my lawful Son, from succeeding to said Lands and Estate, or any Part thereof, in all Time coming."

This Entail 1719 was recorded, and Infeftment taken thereon.

The old Man, *John Stewart*, died soon after this Settlement was executed, in the same Year 1719; and Captain
William

William Stewart his third Son, the two elder being dead without Issue-male, was served Heir of Tailzie to his Father in said Estate, and was thereupon infeft.

In the Year 1721, Captain *William Stewart* went to *London*; and, upon Pretence of Friendship to his Infant Niece, sent her down to *Scotland*, and kept her under his Tuition as long as he lived. That he was in the Knowledge of her Right to the Estate is apparent; for in the Year 1725, he took up from *John Binning* Writer in *Edinburgh*, who had been employed as Agent for the Infant, the above-mentioned Process of Exhibition, with the principal Minutes and Interlocutors thereon.

1727. Captain *William Stewart* died without Issue; and as *James*, the fourth and youngest Son of old *John Stewart*, was then also dead without Issue, *Agnes Stewart*, the eldest Daughter, took the Estate, as Heir to her Brother *William*, upon the Footing of the Entail 1719, and possessed the same till the Year 1732, when she also died without Issue.

Upon the Death of *Agnes*, the eldest Daughter, *John Coltrain* of *Drummorel*, the Son of *Elizabeth* the second Daughter was served Heir of Tailzie to his Aunt *Agnes*, and continued to possess the Estate during all the remaining Years of the Pursuer's Minority: And it is impossible to doubt, from the Circumstances of the Case, and the near Connection of the Parties, that he was in the Knowledge of his Cousin's Claim to this Estate: He lived in the House with his Aunt *Agnes* for several Years before her Death; and it is very certain that Endeavours were used to prevail upon the Pursuer, after her Majority, to renounce her Birth-right: And, indeed, *John Coltrain's* Knowledge of the Pursuer's Title is strongly verified by the Deeds which give rise to the present Process.

For

For duriug the Lifetime of *Agnes* the eldest Sister, the said *John Coltrain* was married to Mrs *Christian Herron*, third Daughter to Mr *Herron* of that Ilk; and by the Contract of Marriage he became bound and obliged "to infest and secure her, in case of his Pre-
 " decease, in an yearly Annuity of 600 Merks, to be up-
 " lifted and taken out of his paternal Estate of *Drum-*
 " *morel*." And by an after Clause in the same Marriage-
 articles, "in case it should happen, that he, the said
 " *John Coltrain*, should at any Time during the Ex-
 " istence of said Marriage, succeed to the Lands and
 " Estate of *Phyfgill*, in that Case he obliged himself
 " to *disburden and free* his said Lands and Estate of
 " *Drummorel*, of the said yearly Annuity provided to
 " the said Mrs *Christian Herron* in Manner above-men-
 " tioned, and to infest and secure her in a yearly
 " Annuity of 900 Merks *Scots*, in case there be Chil-
 " dren of said Marriage, and in a yearly Annuity of
 " 1200 Merks, in case there be no Children, to be
 " uplifted and taken forth of the said Lands and Estate
 " of *Phyfgill*." 1728.

And by a voluntary Deed, of this Date, he settled 1734.
 and provided to his said Spouse an additional Jointure
 and Liferent-provision, and granted to her in place of the
 Provision in the Contract of Marriage, 1200 Merks in
 case of Children, and 1500 Merks in case of no Chil-
 dren; and for her Security thereof, he obliges him-
 self to infest and sease her in the said Lands and
 Estate of *Phyfgill*. And this Deed also contains a Pro-
 vision of an yearly Liferent of 500 Merks, to be up-
 lifted forth of his paternal Estate of *Drummorel*, at least
 so much thereof as, with the fourth Part of the free
 Rent of the Estate of *Phyfgill*, in Terms of the Entail,
 should amount to the foresaid Annuity of 1200 Merks
 in the Event of there being Children, and of 1500 Merks
 if there should be no Children. And in Terms of the

Precept contained in this Bond of Liferent-provision, the said Mrs *Christian Herron* was accordingly infest.

The Anxiety with which these Provisions are laid, as far as the Entail would permit, upon the Estate of *Phyfgill*, and the paternal Estate was relieved, betrays a secret Knowledge of the precarious Tenor by which he held that Estate, by very strong and real Evidence.

The Pursuer *Agnes* was an Infant when the fraudulent Settlement in 1719 was executed; she was not thirteen Years of Age in the Year 1728, when her Estate was again disposed of in *John Coltrain's* Contract of Marriage. She was poorly maintained by her Friends, and kept in Ignorance of her Title, until after she attained the Years of Majority, when she happened accidentally to discover that Duplicate of the Marriage-Contract, which had been left with her Grandmother's Friends, still blank in the Witnesses Names and Designations: And though all possible Enquiry was made after the other Duplicate, she could make no Discovery, further than that it was in the Charter-Chest of the Family, when *John Coltrain* of *Drummorcl*, upon his Succession, caused inventory the Papers therein contained, in the View of making up his own Titles to said Estate.

Agnes Stewart being married to the other Pursuer *John Hathorn*, in order to assert their Title to this Estate, granted a Bond to a Trustee, who thereupon obtained an Adjudication against her, as charged to enter Heir to her Grandfather; and upon that Title brought an Action of Reduction and Improbation in the Year 1740, to set aside the Tailzie 1719, as *contra fidem tabularum nuptialium*.

She was also obliged to insist in a separate Process for proving the Tenor of her Grandmother's Marriage Settlement; and in the Course of this Process, the said Marriage-

Marriage-Contract was discovered to be in the hands of Mr *Herron* of that Ilk, Father-in-law to the said *John Coltrain of Drummorel*.

The Pursuer then insisted in the Reduction upon this Contract of Marriage; and your Lordships unanimously found, "That *John Stewart*, the Maker of
" the Entail, could not settle the Estate provided in
" the Contract of Marriage to the Heirs of the Marriage, so as to prefer his own Daughter *Elisabeth* and
" her Issue to *Agnes Stewart* the Heir of Line of the
" Marriage; and therefore sustained the Reasons of
" Reduction of the Deed of Entail."—And, upon advising a Reclaiming Petition and Answers, your Lordships found, "That the said *John Stewart* had no Power
" to make the Deed of Entail 1719; that the same is
" *contra fidem tabularum nuptialium*, and therefore re-
" duceable, &c."

After this Decision, which was affirmed upon an Appeal, and after *John Stewart's* Death, Mrs *Christian Herron* insisted in an Action against the now Pursuers, to make effectual her Liferent Annuity upon the Estate of *Phyfgill*, and, in terms of her Liferent Right, to obtain Payment of the fourth Part of the free Rent of said Estate.

And from the Proceedings in that Process before your Lordships, and in the House of Peers, it is evident, that the prevailing Argument was, that the Widow, in so far as a Provision was made in her Contract of Marriage, was to be considered as a *bona fide* onerous Purchaser, and that the after Deed was executed when her Husband was supposed to be in the Right of Fee and Property of the said Estate.

Your Lordships, of this Date, pronounced the following Interlocutor: " Find that the Obligation entered into by *Coltrain of Drummorel*, in the Marriage
" Settlement between him and Mrs *Christian Herron*,
whereby

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“ whereby he was bound to settle upon her a *Liferent-*
 “ *provision to the Extent of L. 50. Sterling yearly, was*
 “ *onerous on the Part of the said Mrs Christian Herron,*
 “ and rational upon the Part of the said *John Coltrain;*
 “ and that he having implemented the same, by granting
 “ *the Liferent-Infeftment to that Extent,* when he was in
 “ the Right of Fee and Property of the Estate of
 “ *Phyfgill,* and his Right subject to no Challenge
 “ from any Thing that did, or could appear upon the
 “ Records, that Infeftment was just and onerous,
 “ and does subsist in her Person, notwithstanding of
 “ the Reduction afterwards brought against the Right
 “ and Title of the said *John Coltrain,* upon the latent
 “ personal Obligation contained in the Marriage-Con-
 “ tract 1668, between *John Stewart* and *Agnes Stewart*
 “ his Spouse, whereby he was bound to settle the
 “ Estate he should acquire in favour of the Heirs
 “ whatsoever of the Marriage; and notwithstand-
 “ ing of the Decree obtained in that Reduction,
 “ setting aside the Right of the said *John Coltrain,* which
 “ the Lords found *could not hurt the said onerous Life-*
 “ *rent-Settlement,* made to *Christian Herron* the Pursuer
 “ by her Husband, while he stood in the full Right
 “ of Property of the Estate, conform to the Infeft-
 “ ments, and Investitures thereof.”

This Judgment was affirmed upon an Appeal, in
 consequence of which the Widow has enjoyed this
 Annuity of *L. 50. a-Year* out of the Estate of *Phyfgill,*
 and has received the other 300 Merks a-Year which
 was provided as an additional Annuity by her Hus-
 band's Postnuptial voluntary Deed from the Estate of
Drummorel.

The Pursuers now insist before your Lordships in a
 Claim to be relieved of this Burden, which was
 brought upon the Estate of *Phyfgill* by the Deed of
John Stewart, whose Title to that Estate was most just-
 ly reduced. And the Foundation of this Claim, at
 first

first Sight, seems to be very obvious: By the Tailzie 1719, which is found to have been *contra fidem*, and in defraud of her Right, she was not only postponed to the whole other Issue, male and female, descended of her Grandfather's Body, but also, though an Infant incapable of giving Offence, she was for ever excluded: And therefore, as *John Coltrain*, who had no other Title to this Estate but the aforesaid fraudulent Deed of Tailzie 1719, charged the same with this Incumbrance of a Liferent-annuity in favours of his Wife, so as even to relieve his own separate Estate; though that Incumbrance is found available to the Widow as a *bona fide* Purchaser, he is bound by all the Rules of Law and Justice to relieve the Incumbrance so imposed.

The Grandfather, old *John Stewart*, was *verus dominus* of this Estate in the properest Sense, notwithstanding the Contract of Marriage; he had Power to sell the Lands, to affect them with Debt, and could have effectually burdened this Estate with rational Provisions to a second Wife and her Children. Such Provisions would have been good against the Pursuer as Heir of the first Marriage; yet there is no question that she would have been entitled to pursue such an Action of Relief out of any separate Estate which had been left by her Grandfather: And there does not occur any good Reason why the same Action should not be competent against *John Stewart* the Grandson, and his Representatives, who took this Estate by a gratuitous Disposition *contra fidem tabularum*, and enjoyed the Rents of it for so many Years: Yet your Lordships Interlocutor has not gone so far as to find the Pursuers entitled to a total Relief of this Incumbrance; and the Respondents have not complained of the Limitation, believing that the Petitioners would have acquiesced; but as they have thought proper to complain of one

Part of the Interlocutor, the Respondents must enter their Caveat, that they are at Liberty, and are not understood to acquiesce in the other Part of the Interlocutor. The Interlocutor " finds the Pursuers entitled to Relief " of the Annuity of 600 Merks originally contracted " to be paid out of the Estate of *Drummoch*, and there- " after transferred to the Estate of *Phyfgill*; but finds " them not entitled to any Relief of the additional " 300 Merks imposed on *Phyfgill* by the Contract of " Marriage."

It is very material to observe, that by your Lordships Judgment, sustaining the Widow's Claim to an Annuity out of the Estate of *Phyfgill*, as above recited, her Claim is not sustained to the full Extent by the postnuptial Deed of her Husband: She was provided to 1200 Merks in the Event of Children, which happened, out of the Estate of *Phyfgill*; but your Lordships sustained her Claim only in so far as it was onerous, viz. to the Extent of 900 Merks contained in the Contract of Marriage.

It is therefore a Point adjudged, that the Widow had no Title to demand the additional 300 Merks out of the Estate of *Phyfgill*. This was a voluntary gratuitous Deed, which could not be effectual against the Estate after the Title of the Granter was reduced; and so your Lordships have found, " that the Infestment " was just and onerous, and does subsist in her fa- " vours," only to the Extent of the 900 Merks, or *L. 50. Sterling*, which was stipulated by the Contract of Marriage.

It is plain, therefore, that the additional 300 Merks, which was granted by a voluntary gratuitous Deed of the Husband, is altogether out of this Question: It is impossible to maintain that the gratuitous Deeds of a Person whose Title is reduced, though he had been clearly a *bona fide* Possessor, can be good against the
Estate

Estate when evicted: Your Lordships have found the Reverse in this Case, and have only sustained the Infeftment as a good Security in so far as it was granted in Implement of the Marriage-Articles.

It must follow, therefore, very clearly, that the Question now before your Lordships must be considered in the same Light as if no additional Annuity had been granted at all, but that the Infeftment had been granted in Implement of the Contract of Marriage, and in Security of the 900 Merks thereby stipulated to be paid out of the Estate of *Phyfgill*, in the Event of *John Stewart's* Succession thereto.

And, in this View of the Case, the Justice of your Lordships Interlocutor, in so far as it finds the Pursuers entitled to Relief, and the Fallacy of the Petitioner's Reasoning, will be very clear.

The plain and obvious Ground of your Lordships Interlocutor is, That in so far as *John Stewart's* paternal and separate Estate was relieved, or, to use the Petitioner's Words, *lucratus*, by transferring a Burden, which was imposed upon it, to the Estate of *Phyfgill*; in so far the Pursuers are entitled to Relief, and no farther. This proceeds upon the Reasoning in the Petition, that even a *bona fide* Possessor cannot profit himself by transferring a Burden which was originally laid upon his separate Estate, to the Estate which is evicted from him as the Right of another. The additional 300 Merks, which by the Terms of the Contract of Marriage was only provided in the Event of his Succession to *Phyfgill*, and was never imposed as a Burden upon his own Estate, remains, by your Lordships Interlocutor, an Incumbrance on the Estate of *Phyfgill*; but we are justly relieved of the 600 Merks, because it was originally a Debt of his separate Estate, and was transferred upon ours: And the additional 300 Merks, which was voluntarily granted after the Marriage, can with no Propriety enter

ter into this Question, nor be maintained as a Charge upon the Estate of *Phyfgill*, in consistency with your Lordships former Judgment, which limited the Widow's Infeftment to her Provision in the Contract of Marriage only, nor indeed in consistency with any Principles of Law.

The Petitioner argues, That there can be no Ground for any Action of Damages in this Case, because Captain *Stewart* was guilty of no wrong or tortious Act by charging the Estate with those Provisions to his Wife. But the Respondents will suppose in the Argument, notwithstanding of the strong and convincing Circumstances to the contrary, that Captain *Stewart* was a *bona fide* Possessor; and, in that View, the Claim of Relief is not founded upon any Complaint of a wrong or tortious Act, but upon this plain Principle of common Justice and Law, That, as he took and enjoyed for many Years my Estate, by virtue of a Deed which was gratuitous and fraudulent in the Granter, you are obliged to restore it to me, free of any Burden or Incumbrance imposed upon it by your own Act. There would have been nothing wrong or tortious, if Captain *Stewart* had borrowed Money, and granted heretable Bonds upon this Estate; yet there is no question that he would have been under an Obligation to have purged those Incumbrances, when the Estate was recovered by the right Owner: There would have been nothing irrational nor wrong in the Thing, if, upon a Supposition that he had never been married, he had granted the like voluntary and gratuitous Bonds of Annuity to any of his best Friends or Acquaintances; yet the Petitioner's Argument, That though my Estate was thereby burdened, he was not thereby *lucratus*, would certainly not have availed; nor could such gratuitous or voluntary Deeds, however rational or innocent, have been sustained as Burdens

dens upon my Estate after Eviction, though, no doubt, they would be good against the Granter's Heirs.

And, indeed, the Petitioner carries his Doctrine of Favour to *bona fide* Possessors, upon a Title apparently good, though liable to Challenge (which is the Case of every *bona fide* Possessor) beyond all Bounds. It is a certain Principle clearly established, both in the Civil Law, and in the Writings of our own Authors, That a *bona fide* Possessor is obliged to restore the Subject *tantum et tale* as he received it, or the Value of it, in so far as it is alienated or effectually burdened by his onerous Deeds. The Law has, indeed, given him a great Benefit, and distinguished him highly above the *mala fide* Possessor: He is not obliged to restore the Fruits and Profits of the Subject, however much *lucratus* thereby; *facet fructus, perceptus et consumptus suum*: But this is the utmost Limit of the Advantage which the Law has allowed to *bona fide* Possessors; and, in this particular Case, Captain *Stewart* has enjoyed amply that Benefit: He drew the Rents of these Lands to an Amount that was equal to the Value of the Estate, from the 1720 till the 1743, and in Circumstances which, at least, create a violent Suspicion he was not ignorant that his Right was not good.

The Petitioner mentions a Circumstance of Favour, which can be of no Weight in the Argument, but is a great Mistake in fact, That Captain *Stewart* laid out large Sums to make Improvements upon this Estate. On the contrary, the Respondents do aver, and could easily prove, if it was material to the Issue, that he never laid out any thing upon Improvements; and that, for Years before the Eviction, the Ground was very ill treated, as frequently happens when a Possessor foresees that he is likely to be removed.

Upon the whole, the Respondent apprehends it is clear, that the 300 Merks provided as a gratuitous and

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additional Annuity is entirely out of this Question. The Case must be considered alone upon the Footing of the Contract of Marriage, which was the sole Ground of your Lordships Judgment finding, that the Widow's Infestment was onerous, and subsisting upon the Estate of *Phyfgill*: And, in this View, there can be no question that the Respondents are entitled to Relief of the 600 Merks, which was originally imposed upon Captain *Stewart*'s proper Estate, and was transferred upon the Estate of *Phyfgill*; and that Captain *Stewart*, and his Representatives upon the separate Estate, have benefited as highly by his supposed *bona fides*, as can at all be consistent with any Principles of Law or Justice to the Pursuer, who has suffered a heavy Injury by being kept out of her just Right for the best Part of her Life, and receiving it, after all, under a Burden contracted by the Person who possessed it long without any just Title.

In respect whereof, &c.

FRANCIS GARDEN.

